FEDERATION REPORTS.

SAMUEL DANIEL v. LILY DANIEL.

[App. Civ. Juris. (Taylor, J.) October 28, 1950]

[K.L. — Civil Appeal No. 13 of 1950]

Maintenance — Application to confirm provisional maintenance order made in Singapore — Forum conveniens — Reciprocal Enforcement of Maintenance Orders Ordinance (Chapter 47) — Reciprocal Enforcement of Maintenance Orders Enactment (Chapter 4).

In this case an application was made to the Magistrate at Kuala Lumpur to confirm a provisional maintenance order made in Singapore. At the hearing it was requested on behalf of the husband that the proceedings should be remitted to Singapore for further evidence to be taken on the ground that the facts alleged occurred in Singapore and the witnesses resided there. This was refused and the provisional order was confirmed. The husband appealed.

Held, that it was a wrong exercise of discretion to confirm the order without giving the husband an opportunity to prove the facts alleged and therefore the appeal must be allowed.

CIVIL APPEAL.

R. P. S. Rajasooria for the appellant.

Buhagiar (Federal Counsel) for the respondent.

Taylor, J. : — This was an application to the Magistrate at Kuala Lumpur to confirm a provisional maintenance order made in Singapore. At the hearing Counsel for the husband raised one of the statutory defences and requested that the proceedings be remitted to Singapore for further evidence to be taken on the ground that the facts alleged occurred in Singapore and the witnesses resided there. This was refused and the provisional order was confirmed.

It is true that certain technical points were taken and these may have obscured the matter and made unnecessary difficulties, but however that may be, it appears that the husband had followed the correct procedure on the main points.

I am therefore of opinion that it was a wrong exercise of discretion to confirm the order without giving the husband an opportunity to prove the facts alleged.

There was one further point. It appeared very doubtful whether an order under section 11 of the Ordinance establishing reciprocity between the Federation and Singapore had been made and I adjourned the matter for this to be verified. It was at first suggested that this point was covered by the repeal of the Straits Settlements Ordinance, Chapter 47 of the Revised Edition of 1936. I think this argument is completely misconceived. However, after the adjournment, Mr. Buhagiar, a Federal Counsel, argued that the point was covered by the provisions of section 12 as applied to the repealed Enactment, (Chapter 4 of the Revised Edition) of the Federated Malay States. He submitted that the word "territory" is not technical and that Singapore is, in truth, part of the territory mentioned in the repealed enactment. I think this argument is correct and that whatever the position may be in Malacca and Penang, as regards Selangor reciprocity with Singapore survives by operation of law without a further order by the High Commissioner under section 11.

The appeal was therefore allowed and it was ordered that the proceedings be remitted to Singapore so that the facts may be litigated in the more convenient forum.

Appeal allowed.

TENGKU ZAHARA BINTI TENGKU CHIK v. CHE YUSOFF BIN CHE MAT.

[Orig. Civ. Juris. (Briggs, J.) November 29, 1950]

[Kota Bahru — Civil Suit No. 107 of 1950]

Kelantan Land Enactment — Jual Janji Rules — Transaction not a genuine jual janji one but in the nature of a mortgage — Rate of interest — Interest (Usurious Loans) Notification, 1924.

In this case the plaintiff sued for redemption of her land in Kota Bharu. The defendant alleged that there had been a **jual janji** transaction between him and the plaintiff by which in consideration of the sum of $5,160/- the land had been transferred to him. He also alleged that the time for repayment of the amount lent, which was two years under the agreement, had elapsed and therefore the plaintiff had no right to recover the land. The plaintiff in her evidence alleged that the actual sum lent was $3,000/- and that the balance of $2,160/- represented interest for two years at the rate of $90/- a month.

Held, (1) that on the facts the plaintiff's account of the matter must be believed and therefore this was not a regular **jual janji** transfer, but was an irregular transaction in the nature of a mortgage; (2) that the English rules of equity with regard to redemption applied and that this was a case in which redemption must be allowed: and (3) that the interest charged was excessive and should be reduced to $300/- a year or $900/- in all.

Cases referred to :—

(1) *Haji Abdul Rahman v. Md. Hassan* (1917) A.C. 211.

(2) *Yaacob bin Lebai Jusoh v. Hamisah binti Saad* (1950) M.L.J. 255.

ACTION.

R. P. S. Rajasooria for the plaintiff.

C. C. Goh for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Briggs, J. : — In this case the plaintiff sued for redemption of her land, Lot No. 161, Section 6, in the town of Kota Bharu, together with the four houses built thereon, all alleged to have been mortgaged by her to the defendant for the sum of $3,000.00 and interest. The plaintiff alleged that she received by way of secured loan the principal sum of $3,000.00, paid as to $2,500.00 on the occasion of the execution of the document hereinafter mentioned and as to the remaining $500.00 at a somewhat later date. She alleged that interest was to be charged on the loan at the rate of three *per cent.* per month, *i.e.* $90.00 monthly. The loan was to be for two years. In consequence of this arrangement, a document was prepared by the defendant in the form of Schedule 24A to the Kelantan Land Enactment, which is that of a "transfer under Jual Janji Rules." These transactions are an integral part of the land registration system of the State of Kelantan, but I am not aware that they exist elsewhere in statutory form. It will be necessary to consider the nature of the transaction at some length later.

The document provides that the plaintiff, as registered proprietor of the land described, which is under Grant No. 2910, in consideration of the sum of $5,160.00, the receipt whereof is acknowledged, transfers her title in the land to the defendant "under the provisions of the Jual Janji Rules." This document was executed by the plaintiff by thumbprint and she agrees that she was fully aware of its contents. There is a side note in the following form : — "Together with all houses standing thereon." This a variation from the standard form, the object of which is no doubt to prevent any subsequent allegation that any of the houses was moveable. The document continues with an acceptance by the defendant of the transfer "subject to the provisions of the Jual Janji Rules", and the defendant agrees that in the event of repayment of $5,160.00 "after the expiration of two years from the date of this transfer but before the 3rd March, 1950", he will retransfer the land to the plaintiff. Both parts of the document are dated 3rd February, 1948. It was duly attested by the Assistant District Officer, stamped and registered. On the 1st March, 1948, the plaintiff paid to the defendant the sum of $90.00 and the defendant gave a receipt therefor in the form following : — "On 1st March, 1948 received from Tengku Zahrah the sum of dollars ninety in respect of Jual-Janji for the month of February, 1948." A month later the plaintiff paid a further sum of $90.00 and a receipt in similar form was issued, but dated the 1st April, 1948, and stating that the sum was in respect of the month of March, 1948. No further payments have been made, and the amount due was not tendered at any time prior to the 3rd March, 1950. The plaintiff, her husband and her son all swore that the capital sum lent was $3,000.00 and that the remaining $2,160.00 of the total sum of $5,160 referred to in the document represented interest on $3,000.00 for two years at $90.00 per month. The plaintiff has continuously remained in possession of the property, which consists of a house occupied by herself and three houses let out by her at rents of $30.00, $30.00 and $20.00 respectively, the rent of which she has continued to collect. The plaintiff undertakes to pay all sums which may be found due to the defendant and claims redemption.

The defendant swore that $5,160.00 had been handed to the plaintiff in notes at the time of the execution of the document. He said that under "Jual Janji" arrangements he had a right to possession of the land and the plaintiff had made an oral agreement of tenancy with him on which she was to pay a rent of $90.00 per month. He claims not only to retain the land as his absolute property, but also that the plaintiff is still liable to pay him $1,980.00 for the twenty-two months rent unpaid, and presumably rent at $90.00 per month since the 3rd March, 1950.

On the facts I have not the slightest hestitation in finding that the plaintiff's account of the matter is true and the defendant's is false. The plaintiff's explanation of the way the sum of $5,160.00 was arrived at is consistent with all the probabilities. It explains the two payments of $90.00 each and why the receipts should be stated to be "in respect of Jual Janji" and not in respect of rent. As regards the cessation of the monthly payments of $90.00, she apparently realized that under the terms of the document the amount due in respect of interest was not payable until the expiration of the two years, and she adds that the defendant said that it did not matter and she could wait until that time. She said in examination-in-chief that there was no agreement that she should pay rent for the house that she lived in on the land and she was not cross-examined on this point. She was an excellent witness and I was particularly impressed by her frankness in admitting freely that she knew the terms of the document and that the expressed consideration was $5,160.00. Her son was a stupid and rather poor witness who gave the impression of being prepared to give almost any answer which he

thought would help his mother, and who in consequence helped her not at all. I placed very little reliance on his evidence and should have placed none on it in any matter on which it was not corroborated. The plaintiff's husband was another good witness. I believe his evidence and it fully corroborates the plaintiff. As regards the value of the land, he said it was worth not less than $12,000.00 at the time of the transaction and is now worth about $15,000.00. The plaintiff was not prepared to commit herself so exactly, but estimated as now being worth well over $10,000.00 and in the neighbourhood of $20,000.00. On this particular point the defendant's evidence is that the land was worth about $6,000.00 when it was transferred and now worth about $12,000.00. If it is worth no more than $12,000.00 now, the probabilities are that it was worth much more than $6,000.00 when it was transferred in February, 1948. There has been no further development, and although prices have risen in that period, they certainly have not doubled. I am therefore of opinion that the land was worth somewhere in the neighbourhood of $10,000.00, if not more, at the time of the loan. I was by no means impressed with this witness's demeanour, but apart from that I consider that on the probabilities his story cannot possibly be true. He accounts for the peculiar capital sum of $5,160.00 by saying that the plaintiff wanted $6,000.00, that he refused to advance this but agreed to $5,000.00, and as regards the $160.00 he said that it was for Tengku Ismail, the broker, who is now dead. When asked, "Was not $160.00 an odd sum to pay the broker?" he said, "I don't know; there were two brokers." When it was put to him that the amount represented $3,000.00 plus twenty-four times $90.00, he said, "No, the Jual Janji was for twenty-five months." This of course is only half the truth. The statutory minimum period for a Jual Janji agreement is two years, and as there must obviously be some interval during which repayment is permitted, the extra month was no doubt put in for this purpose; but in substance it may be regarded as a loan for two years. The defendant said that he was not a professional moneylender, but that he had two other *Jual Janji* agreements current at the present time for $2,000.00 and $21,000.00 odd respectively. I find as a fact that $3,000.00 was advanced as capital and the remaining $2,160.00 merely represented interest agreed to be paid.

What then is the situation in law? Mr. Goh for the defendant relied on the terms of section 108A of the Kelantan Land Enactment, 1938, which reads as follows:—

"108A. (i) The registered proprietor of any land may execute a Jual Janji transfer of such land in the form in Schedule 24A hereto and thereupon such land shall vest in the transferee subject to the provisions of any Rules which His Highness the Sultan in Council may make for the regulation of such transactions.

(ii) Rules made by His Highness the Sultan in Council for the regulation of Jual Janji transactions shall be published by Notification and all Jual Janji transactions shall thereupon be governed by such Rules, the provisions of any other law to the contrary notwithstanding."

and on Rule 9 of the Jual Janji Rules, which are to be found in Notification No. 91 of 1938. Rule 9 reads as follows:—

"9. Upon the expiration of the redemption period without payment of the consideration the transferee shall be deemed to be proprietor of the land free from any obligation under the Jual Janji Transfer and all the interest of the transferor in such land shall cease."

It is to be observed that the last words of section 108A do not merely exclude the application of any other written law, but of *any* law to the contrary, and I think there was a clear intention to exclude the application of the English Rules of Equity applicable to mortgages. I am therefore of opinion that if a transaction were carried out in all respects regularly in accordance with section 108A, schedule 24A and the Jual Janji Rules, the date of repayment would be of the essence of the transaction and the Court would not permit redemption at a later date unless in special circumstances, for example, if the transferee had himself in some way prevented repayment. Mr. Goh contends that in this country there can be no equity of redemption in the case of a transaction such as this. In that, however, I think he goes too far, for this was not a transaction regularly carried out in accordance with the provisions of law relating to *Jual Janji,* but was substantially irregular and in contravention of those provisions in a number of ways. First, an artificial consideration was introduced in place of the true consideration of $3,000.00. Secondly, provision for payment of interest was introduced. The whole purpose of *Jual Janji* transactions is to provide a procedure for securing loans and giving the lender adequate recompense therefor without infringing the prohibition of usury which is binding on the conscience of all good Muslims. In its proper form the transaction involves an actual transfer of possession and the enjoyment by the transferee of the rents and profits of the land during the period before the retransfer. An agreement that the transferee will let the transferor remain in possession in consideration of a rent is not offensive to Muslim views, but such an agreement, even if made, would not justify the capitalisation of the rent or its inclusion with the sum intended to be lent. Thirdly, if that had been the arrangement between the parties, the receipts would clearly have been given "for rent". Fourthly, if the two sums of $90.00 represented rent and the defendant

was entitled to continue to collect such sums, he would unquestionably have given notice to the tenants of the three houses not occupied by the plaintiff to pay their rents to him and would so have collected $80.00 per month, even though the plaintiff could have paid him nothing. Fifthly, if the defendant for some reason did not wish to do that, he would at least have made efforts to recover payment of the $90.00 per month, if not during the actual currency of the agreement, then at latest after the agreement had expired, and the land had become his absolute property. As regards repayment, Rule 4 of the Jual Janji Rules provides that the transferor may not repay within two years unless with the consent of the transferee. Thereafter he may repay at any time until the date stated in the agreement. Rule 7 provides that until that date the transferee shall not transfer, lease or charge the land to any person other than the transferor. Rule 9 provides that on the expiration of the redemption period without payment of the consideration the transferee shall be deemed to be proprietor of the land, and all the interest of the transferor shall cease. Rule 11 provides that on repayment to the transferee within the redemption period it is the duty of the transferee to report the repayment to the Land Registrar, unless a proper retransfer has been presented. Failure to report is an offence. In view of the express terms of the receipts given by the defendant, I think the provisions of Rule 11 may well have applied to them, for I think this may be a case where the whole would include a part. It seems to me that I am entitled to look at the two receipts as well as the original document in considering what took place. I am also entitled to hear evidence that the consideration stated was not in fact paid, and on these materials I have no hesitation in holding that this was not a regular *Jual Janji* transfer, under which the right of redemption might have determined finally on the 3rd March, 1950, but was an irregular transaction in the nature of a mortgage, and is subject to the rules laid down by the Privy Council in *Haji Abdul Rahman v. Md. Hassan*[1] and recently exemplified in the Court of Appeal's decision in F.M. Civil Appeal No. 22 of 1950, *Yaacob bin Lebai Jusoh v. Hamisah binti Saad*[2]. It is clear that where such a position is established, the English Rules of Equity with regard to redemption have their full effect, and this is clearly a case where redemption must be allowed.

There is, however, another basis on which, I think, this claim must succeed, and that is by reason of the provisions of Kelantan Notice No. 45 of 1924 "Regarding Interest on Money" usually known as the "Interest (Usurious Loans) Notification, 1924". Copies of this are scarce, so I think it desirable to set it out in full :—

"STATE OF KELANTAN

Notice No. 45/1924.

REGARDING INTEREST ON MONEY.

It has pleased His Highness the Sultan in Council to order as follows:—

1. In any proceedings in any Court involving a claim for interest, if the Court has reason to believe that the interest is excessive, the Court may relieve the debtor of all liability in respect of any excessive interest notwithstanding that such interest has been agreed to by the debtor. "Court" includes a Collector of Land Revenue exercising jurisdiction in respect of an application by a chargee for an order of sale of land.

2. No Court shall decree interest at a rate exceeding 24 per cent. per annum, nor give judgment for the payment of interest (including interest already paid) in excess of the principal sum.

3. No Government Office shall register any document involving liability to pay interest at a rate exceeding 24 per cent. per annum.

4. Nothing in this Notice shall apply to loans under the Pawnbroking Farms Enactment, 1910, or to mortgages bearing interest not exceeding 2½ per cent per month registered in a Land Office before the date of this notice. Passed in Council on this 30th day of December, 1924."

I assume that this Notice, which has statutory force, authorises the Court to reopen transactions in the same manner as the Usurious Loans Enactment of the Federated Malay States, and that I am entitled to enquire first, what was the capital sum lent, and secondly, what is the actual amount being charged for interest on that capital, regardless of the manner in which the transaction may have been disguised. On my finding of fact that only $3,000.00 was lent, the interest in this case is clearly illegal under Clause 2 of the Notice. In any event, it is clearly grossly excessive for, on the most conservative estimate, the land was worth double the amount lent and was more than adequate security for the loan.

In the circumstances I propose to relieve the plaintiff of all liability for interest in excess of ten *per cent. per annum* on $3,000.00. I see no need in this case to observe the English Chancery practice of allowing six months from the redemption decree as the period of redemption, and I shall order that redemption shall be permitted at any time not later than 12 noon on the 3rd February, 1951 and that, if the sum hereinafter mentioned shall not have been paid to the defendant or into Court by that time, the plaintiff shall be for ever foreclosed of her equity of redemption. The sum payable, regardless of the date on which it is tendered, will include interest up to the 2nd February, 1951, thus making a total period of three years at $300.00 per annum, or $900.00. The amount payable will therefore be $3,900.00, less $180.00 paid, or

$3,720.00 in all. The costs of these proceedings will be paid by the defendant to the plaintiff and, if not previously paid, may be set off against the said sum of $3,720.00. I order the defendant to deposit Kelantan Grant for Land No. 2910 in Court within seven days of this order. I order that, in the event of payment into Court or to the defendant being made by way of redemption as hereby ordered, the said grant shall be delivered out to the plaintiff, and, in the like event, the defendant shall execute within seven days after such redemption a valid registrable transfer of the land to the plaintiff, and that in default of such execution the Assistant Registrar, Supreme Court, Kota Bharu, shall execute such a transfer on behalf of the defendant and the same shall be duly registered. I also order that the caveat now imposed on the land in question in the suit to protect the interests of the plaintiff be extended until the 3rd February, 1951, or prior presentation of a registrable transfer in favour of the plaintiff, and thereupon be removed. A draft of the formal order in this case is to be submitted for my approval.

Order accordingly.

SOONG CHEE KONG v. PUBLIC PROSECUTOR and NG SOON SUM AND ANOR. v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Taylor, J.) December 11, 1950]

[K.L. — Criminal Appeal Nos. 45 and 39 of 1950]

Customs Enactment, 1937, s. 106 — Forfeiture.

In all cases under the Customs Enactment the Magistrate has a discretion as to the forfeiture of goods or vehicles.

Beh Chang Hin v. Public Prosecutor(1) followed.

Public Prosecutor v. Nai Hor Par(3) not followed.

Principles of punishment in revenue cases explained and applied.

Cases referred to :—

(1) *Beh Chang Hin v. Public Prosecutor* (1950) M.L.J. 239.

(2) *Public Prosecutor v. Lee Ah Sam* (1949) M.L.J. 236.

(3) *Public Prosecutor v. Nai Hor Par* Ipoh Criminal Miscellaneous Application No. 11 of 1947 (unreported).

CRIMINAL APPEAL.

A. J. Bostock-Hill for the appellant in Criminal appeal No. 45 of 1950.

S. M. Yong for the appellant in Criminal Appeal No. 39 of 1950.

A. M. I. Austin (D.P.P.) for the respondent in both appeals.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — The appellant was convicted of the possession of uncustomed goods. The facts, briefly, are that the accused, who is a watch dealer, was stopped at a customs barrier with 646 watches in his car. After a long investigation the customs officers released 456 watches but prosecuted him in respect of the remaining 190, which were separately and differently packed. He was not charged with smuggling. The gist of the matter is this. The preventive men seize a suspected parcel and say : — "Duty has not been paid on this." If the sale records and duty receipts have not been kept systematically, it is virtually impossible to prove this negative proposition. The law, therefore, shifts the onus and requires the accused to prove that the duty has been paid — otherwise any dealer could defeat the revenue by breaking bulk, mixing smuggled with innocent goods, keeping only hazy records of sales and muddling his receipts. That was the position of this accused; probably he could not have been convicted of smuggling; just possibly the duty on these 190 watches had been paid. His offence is that he — a regular dealer in dutiable goods and therefore under a duty so to conduct his affairs as to protect the revenue — in breach of his duty muddled his affairs in such a manner as to afford facilities for dealing in smuggled goods. In particular, his muddle left it extremely doubtful whether duty had been paid on these 190 watches and this is the specific matter for which he was convicted.

The value of the 190 watches was stated to be $5,294. The duty was said to be 15% but only $555 was claimed. One or other of these figures is obviously wrong but both counsel accepted them. I have since been informed that the value was correctly stated but by a clerical error the duty was calculated at 10.5% instead of 15%, that the mistake was discovered before the end of the trial but that it was then considered too late to rectify it. Section 278 of the Code should have been applied.

The minimum fine is six times the duty. The Magistrate forfeited the 190 watches and, considering this a great deterrent, he imposed a fine of $3,500, in round figures, the minimum on the basis that the duty was $555.